ORIGINAL

KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036
(202) 955-9600
FACSIMILE
(202) 955-9792
www.kelleydrye.com

NEW YORK, NY
TYSONS CORNER, VA
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM
HONG KONG

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MUMBAI, INDIA
TOKYO, JAPAN

EX PARTE OR LATE FILED

RECEIVED

MAR 16 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 16, 2004

ROBERT J. AAMOTH
DIRECT LINE (202) 955-9676
E-MAIL: raamoth@kelleydrye.com

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Re: ***Notice of Ex Parte Presentation***
CC Docket Nos. 96-262 and 01-92

Dear Ms. Dortch:

ITC^DeltaCom Communications Inc., d/b/a ITC^DeltaCom, through its attorneys, files this notice of *ex parte* presentation. On March 15, 2004, Larry Williams, Chairman and CEO of ITC^DeltaCom, and I, counsel to ITC^DeltaCom, met with Commissioner Michael Copps and his Legal Advisor, Jessica Rosenworcel, to discuss the petition filed by US LEC in CC Docket No. 01-92.

During the meeting, ITC^DeltaCom urged the Commission to deny US LEC's petition and to apply its ruling fully to the conduct in which US LEC has engaged. The CLEC Benchmark Order does not authorize US LEC or any other CLEC to use the benchmark rate for the transit routing of CMRS-originating traffic, and in fact the order and its implementing rule expressly require that the rate reflect all originating access functions. FCC Rule 61.26(a)(5) requires the benchmark rate to cover ***"all applicable fixed and traffic-sensitive charges"*** (emphasis supplied). The Commission constructed this rule based on input from the CLEC industry. In particular, the Association of Local Telecommunications Services ("ALTS") proposed a benchmark rate that would ***"include all switching and transport components."*** *See* Comments of ALTS, filed Jan. 11, 2001, CC Docket Nos. 96-262 & 97-146, at p. 5 (emphasis supplied). Hence, the benchmark rate may be used only if the CLEC actually performs all of the functions that are covered by the rate. It has never been lawful for US LEC or any other CLEC to use the FCC-established benchmark rate for the transit routing of CMRS-originating long distance traffic. The parties also discussed that US LEC's practices are contrary to the Commission's ruling in *Sprint PCS*, 17 FCC Rcd 13192 (2002), that CMRS carriers may not

No. of Copies rec'd 0+4
List ABCDE

imposed tariffed access charges on interexchange carriers except pursuant to a valid contract with such interexchange carriers.

ITC^DeltaCom pointed out that the Commission previously ruled in *AT&T Corporation v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001), that it was unlawful for a CLEC to charge an excessive interstate access rate. In that case, the Commission held that a CLEC's interstate access charge was unjust and unreasonable in violation of section 201(b), relying in part (at ¶¶ 42, 47) on the CLEC's practice of sharing access revenues with its customers as being evidence that the access rate was excessive. Significantly, the Commission applied that ruling on a fully retroactive basis dating back to 1998 without relying on any agency decision notifying the CLEC that its rate might be unlawful. Further, the fact that some interexchange carriers may have paid the CLEC's excessive access rate did not insulate the rate from full scrutiny under the standards in section 201(b). In this case, US LEC's abusive access charge practice, which also involves the sharing of access revenues with its customer, is an unjust and unreasonable practice in violation of section 201(b), and the Commission's ruling should apply, as in the BTI decision, on a fully retroactive basis to US LEC's activities.

ITC^DeltaCom noted that it is the Commission's well-established practice over many years and in numerous cases to apply any ruling that a rate or practice is unjust and unreasonable in violation of section 201(b) on a fully retroactive basis to the case at hand. The Commission often has issued such rulings in response to formal complaints filed pursuant to section 208. *E.g., Global NAPs, Inc. v. Verizon Communications*, 17 FCC Rcd 4031 (2002) (ILEC interconnection practice); *AT&T Corporation v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001) (excessive CLEC access charge); *Total Telecommunications Services, Inc. v. AT&T Corporation*, 16 FCC Rcd 5726 (2001) (sham scheme to inflate access revenues); *Rainbow Programming Holdings, Inc. v. Bell Atlantic-New Jersey, Inc.*, 15 FCC Rcd 11754 (2000) (denial of access to video dialtone system); *The People's Network Incorporated v American Telephone and Telegraph Company*, 12 FCC Rcd 21081 (1997) (backbilling beyond 120 days). As the Court of Appeals has noted, "insofar as Section 208 authorizes the award of damages or other remedies, it is always 'retroactive' in its application in that it will always be changing the economic consequences of a carrier's prior conduct." *Global NAPs, Inc v. FCC*, 247 F.3d 252, 259 (D.C. Cir. 2001). A carrier is always on notice that its rates and practices will be judged according to the standards laid out by Congress in sections 201(b) and 202(a).

There is no principled basis for limiting the practice of applying rulings to the case at hand to section 208 complaint proceedings, and in fact the Commission has adhered to this practice in response to petitions for declaratory rulings. *E.g., Himmelman v. MCI Communications Corporation*, 17 FCC Rcd 5504 (2002) (directory assistance practices); *In the Matter of AT&T's Private Payphone Commission Plan*, 3 FCC Rcd 5834 (1992) (bundling of 0+ and 1+ services).

It bears emphasis that the Commission, like courts, will apply a ruling on a prospective basis ***only*** when the ruling represents a "shift from a clear prior policy." *See Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993); *see also Tennessee Gas Pipeline Co. v FERC*, 606 F.2d 1094, 1115-16 (D.C. Cir. 1979) (retroactive application is impermissible only if the agency changes an explicit past policy). Even if the prior policy was ambiguous, the Commission's practice is to apply a subsequent clarification on a fully retroactive basis to the conduct at hand. *See Global NAPs, Inc. v. Verizon Communications*, 17 FCC Rcd 4031, ¶10 (2002) (declaring Verizon interconnection practice to be in violation of section 201(b) even though consent decree obligation was "ambiguous"). In this case, there is no "clear prior policy" in favor of US LEC's routing and compensation practice – indeed, US LEC has not cited any case in which the Commission has even arguably authorized or approved this practice – and hence the Commission's ruling must be applied on a fully retroactive basis as a matter of law and long-established Commission practice.

A few parties have suggested in the most general terms that some CLECs and CMRS carriers may have engaged in this practice on a *sub rosa* basis prior to the filing of US LEC's petition. None of these parties has identified any details of these arrangements, much less submitted copies of them, on the record in this proceeding. As such, these opaque statements must be discarded as unsupported and self-serving. Further, ITC^DeltaCom was not aware of any such routing and billing practices prior to the discovery of US LEC's scam in 2002. If ITC^DeltaCom paid CLEC invoices containing access charges for wireless-originating traffic, it did not knowingly do so, and would have paid such charges only because the CLEC (as it has been documented that US LEC did) affirmatively concealed the wireless-originating nature of the traffic or disguised its role in transmitting the wireless calls. When ITC^DeltaCom learned that US LEC was invoicing it for CMRS-originating "8YY" calls, ITC^DeltaCom immediately disputed the practice and ceased paying such charges. It bears emphasis that the Commission previously looked into a related issue in CC Docket No. 95-185, and no party informed the Commission of any such practices. In the *Sprint PCS* decision, the Commission made a determination, based on the record in that proceeding, that CMRS carriers recovered their access costs from end users, not from interexchange carriers. The Commission stated: "Until 1998, when Sprint PCS first approached AT&T and other IXCs about payment for terminating access service, all CMRS carriers recovered the cost of terminating long distance calls from their end users, and not from interexchange carriers." *Sprint PCS*, 17 FCC Rcd 13192, 13199 (2002). That holding repudiates any suggestion that this type of abusive routing and compensation practice had become a tacit industry norm.

ITC^DeltaCom does not have the ability as a technical matter to selectively refuse "8YY" traffic delivered to it by US LEC at the ILEC's access tandem, and that ITC^DeltaCom has disputed numerous invoices sent by US LEC for the transit routing of CMRS-originating "8YY" traffic since mid-2002. Such invoices now total more than $3 million. The Commission's ruling should not deliberately or inadvertently give US LEC any openings to

initiate or prosecute a litigation strategy against interexchange carriers in an effort to collect such unlawful charges.

Lastly, ITC^DeltaCom wishes to stress that the current posture of this proceeding does not permit the Commission to issue a decision whereby it determines that US LEC's practice was lawful under pre-existing laws and policies yet will be proscribed on a going-forward basis. This approach would embody the adoption of a new rule by the Commission, which requires a notice-and-comment rulemaking proceeding under Section 553(b) of the Administrative Procedure Act. *See Sprint Corporation v. FCC*, 315 F.3d 369 (D.C. Cir. 2003). In that case, the Court noted that "new rules that work substantive changes in prior regulations are subject to the APA's procedures." 315 F.3d at 374. US LEC's petition for a declaratory ruling, and the Public Notice issued by the Commission, do not satisfy applicable APA requirements. Of course, the Commission need not concern itself with this issue if it finds, as the record shows, that US LEC's practice was contrary to existing Commission precedent as well as the prohibition against unjust and unreasonable practices and rates in section 201(b).

Please contact me at (202) 955-9676 if you have any questions regarding this filing.

Sincerely,

Robert J. Aamoth

cc: Michael Copps (via email)
Jessica Rosenworcel (via email)
Christopher Libertelli (via email)
Matthew Brill (via email)
Scott Bergmann (via email)
Daniel Gonzalez (via email)
Victoria Schlesinger (via email)
Gregory Vadas (via email)
Qualex International (via email)